Texaco Oil Company *and* Robert G. Ravert *and* Michael L. Wergin. Cases 27-CA-6776 and 27-CA-6776-2

November 30, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On April 20, 1981, Administrative Law Judge Joan Wieder issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge, as modified herein, and to adopt her recommended Order, as modified.

We agree with the Administrative Law Judge that Respondent violated Section 8(a)(3) of the Act when it terminated the accident and sickness (A and S) benefits of the six discriminatees on January 8, 1980,[3] the first day of the strike. However, for the reasons stated herein, we disagree with the Administrative Law Judge's recommended remedy as to four of the six individuals.[4] While the Administrative Law Judge correctly determined that these four discriminatees should be reimbursed for benefits lost under Respondent's A and S plan beginning on January 8, 1980, we hereby modify her findings as to which date their respective entitlements ended.

Peter J. Gottfried

Employee Gottfried suffered from chronic rheumatoid arthritis. In December 1979, Gottfried received treatment from a rheumatologist in California while on vacation. Gottfried received permission from Respondent's personnel director by telephone to remain in California on sick leave in order to finish these treatments. Upon his return to Wyoming on January 6 or 7, Gottfried informed Respondent that he was going to consult his local physician before returning to work. However, Gottfried did not see his physician until January 30, approximately 3 weeks later. At that time, Gottfried received an injection (gold salts therapy) and was told by his physician that he could return to work when he "felt like it." Gottfried testified that he felt well enough to work on February 11, and that he began to picket at that time.

The Administrative Law Judge found Gottfried's testimony that he was available for work on February 11 to be dispositive of the issue of what date Gottfried's eligibility for A and S benefits ended. However, it appears that Gottfried may have been medically able to work before that time, possibly following his January 30 doctor's appointment. Furthermore, Respondent may be correct that Gottfried unnecessarily waited 3 weeks to see his doctor, and that his chronic condition would not have prevented him from working shortly after his return to Wyoming in early January. We therefore leave to the compliance stage the question of which date Gottfried was medically able to return to work.

Michael L. Wergin

At the beginning of the strike, Wergin was on sick leave because of a knee injury. He was subsequently released by his doctor on February 7, and began picketing on February 21.

The Administrative Law Judge found that there was no indication that Wergin was ready to work immediately after his release or prior to his commencement of picketing. She therefore concluded that Wergin's entitlement to A and S benefits ended on February 21, the first day that he picketed. However, under *E. L. Wiegand Division, Emerson Electric Co., supra*, a discriminatee is not entitled to recover A and S benefits for longer than the period of his disability. Wergin's doctor released Wergin to return to work on February 7. We therefore find that Wergin's entitlement to benefits ended on February 7, the date of his medical release.

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[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing her findings.

[2] We note that, while Respondent has excepted to the Administrative Law Judge's finding that it is an Illinois corporation, Respondent has not indicated in which State it is actually incorporated.

[3] All dates are in 1980, unless otherwise noted.

[4] We adopt the Administrative Law Judge's recommended remedy as to William B. Noell and John Vin.

Member Jenkins agrees with the findings herein as to the remedy for the reasons set forth in his dissent in *E. L. Wiegand Division, Emerson Electric Co.*, 246 NLRB 1143 (1979), enfd. as modified 650 F.2d 463 (3d Cir. 1981).

Member Zimmerman finds it unnecessary to reach the remedial issue set forth in *Emerson Electric Co., supra*, since the result in this case is the same under either the majority or dissenting approach.

James T. Lake

Lake was placed on sick leave in December 1979, due to back problems, and received treatments from Respondent's doctor at the Casper facility. When the strike began, Lake stopped going in for treatments because he did not wish to cross the picket line. Lake did not seek treatment elsewhere, but remained at home and used a heating pad, as the doctor had instructed. Lake testified that he could have returned to work "sometime after the 20th of January," and that he had begun picketing at that time. Approximately a week earlier, on January 13, Lake had visited the picket line in his car, gotten out, and spoken with several of the picketers.

The Administrative Law Judge found that Lake's eligibility ended on January 13, because the combination of Lake's failure to continue his treatment at the facility and his January 13 visit to the picket line constituted public support of the strike which disqualified him from further A and S benefits. However, we find that under *Emerson Electric Co., supra,* Lake's actions were not a sufficient manifestation of public support to deny him his entitlement to continued A and S benefits. First, a failure to go to the facility for treatments is not an "affirmative" demonstration of support for the strike, as is required in *Emerson Electric Co.*[5] Second, Lake's testimony established that he did not carry a picket sign, and that his visit to the picket line was social; therefore, it does not establish that Lake supported the strike. Since there is no other evidence of strike support prior to Lake's recovery, we reject the Administrative Law Judge's conclusion that Lake's January 13 visit to the picket line disqualified him from further A and S benefits. As the evidence here is insufficient to make a final determination, we leave to the compliance stage the question of whether Lake was medically able to return to work shortly after January 20, as he testified, or at an earlier time.

Robert Ravert

At the beginning of the strike, Ravert was on sick leave with three broken ribs and a fractured shoulder blade. He received a work release from a local doctor on March 24.

The Administrative Law Judge concluded that the only clear evidence of Ravert's ability to return to work was his March 24 work release. She therefore concluded that Ravert's eligibility should end as of that date. However, it appears from the record that Ravert may have been medically able to return to work before the time that he obtained the release from his doctor. Ravert's own testimony suggests that Ravert may not have seen his doctor for several weeks prior to picking up the release, and that he may have picked up the release on March 24 as a matter of convenience because the strike was ending. Thus, we leave to the compliance stage the question of when Ravert was medically able to return to work.

[5] We note in this regard that any attempt by Lake to continue his treatments would likely have been futile; Robert Ravert, another of the six discriminatees, attempted to enter the facility for his medical treatments during the strike, and was refused entry by Respondent.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Texaco Oil Company, Casper, Wyoming, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as modified below:

Substitute the following for paragraph 2(a):

"(a) Make whole the employees listed in the section of this Decision entitled 'The Remedy,' in the manner set forth therein, as modified by the Board's Decision, by paying to each whatever sickness and disability or occupational illness and injury benefits were due them during the period January 8, 1980, to April 1, 1980, with interest."

DECISION

STATEMENT OF THE CASE

JOAN WIEDER, Administrative Law Judge: This case was heard in Casper, Wyoming, on December 17, 1980.[1] Charges were filed on May 10 by Michael L. Wergin and on June 2 by Robert G. Ravert. A complaint was issued July 25 alleging that Texaco Oil Company, herein called the Company or Respondent, interfered with, restrained, and coerced employees in the exercise of their rights guaranteed by Section 7 of the Act by, on or about January 8, suspending sickness and disability payments to five employees; and that by engaging in such conduct and acts because of the Company's employees' membership in and activities on behalf of the Union, Respondent did discriminate and is discriminating against its employees for the purpose of discouraging membership in a union in violation of Section 8(a)(3) and (1) of the Act. Respondent admits in its answer that certain sick and disability payments were terminated, but denies that such action was unlawful or in any way resulted in a violation of the National Labor Relations Act, as amended, herein called the Act.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs,

[1] All dates hereinafter are in 1980 unless otherwise indicated.

which were filed on behalf of the General Counsel and the Company on or about January 19, 1981, have been carefully considered.

Upon the entire record, including especially my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE COMPANY

The Company is an Illinois corporation with an office and place of business in Casper, Wyoming, herein called the Casper refinery, which is engaged in the processing, nonretail sale, and distribution of petroleum and related products. During the course and conduct of its business at Casper, the Company annually sells and distributes goods and materials valued in excess of $50,000 to points and places outside the State of Wyoming. It is admitted, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

The Oil, Chemical and Atomic Workers International Union (OCAW), and its Local No. 2-230, herein individually and jointly referred to as the Union, are admitted to be, and I find that they are, labor orgenizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The Union and Respondent have, since the 1930's, maintained a bargaining relationship. The Union represents a unit of approximately 160 employees. On January 8, at approximately 3 p.m., an economic strike commenced at the refinery and lasted until March 30, when the employees began returning to work at 11 p.m.[2]

On the day the strike commenced, the Company informed the Union that accident and sickness benefits were being terminated when the strike began.

B. *Provisions of Applicable Benefit Plans*

Article XV of the applicable collective-bargaining agreement provides that, if a work stoppage, defined as covered by the agreement, occurs, "[A]ll obligations imposed upon the parties to this Labor Agreement will be suspended with the commencement of such strike and shall continue to be suspended, unless and until it is mutually agreeable to both parties to reimpose said obligations." The contract further provides in article VIII, section 2, that the accident and sickness benefit plan is to be incorporated into and made a part of the collective-bargaining agreement subject to all the provisions of the plan which will determine "all the questions arising under and in connection with the plans, except that the Company agrees that it will not voluntarily discontinue, change or modify such PLANS during the term of this Agreement in such a way as to decrease the benefits under said PLANS to any employee covered by this Agreement."

The details of the plan itself are contained in a booklet entitled "Accident and Sick Benefit Plan."[3] An employee qualifies for accident and sick benefit payments after 1 year of employment. The amount of benefits received is dependent upon the completed years of service. The plan encompasses all regular employees of Texaco who are located within the United States,[4] who are absent from work because of illness or accident. The individuals involved in this case were all described as receiving benefits for nonoccupational illness or injury. They had been receiving payments under the plan before the strike commenced and had their accident and sick benefits terminated at the commencement of the strike. Those employees are: Peter J. Gottfried, Michael L. Wergin, William B. Noell, John Vin, James T. Lake, and Robert G. Ravert. It appears from the record that these were the only unit members who were receiving accident and sickness benefits at the commencement of the strike. All other employees in the unit apparently participated in the strike.[5]

The contract negotiation meeting of January 8, 1980, was memorialized by the Company in a memorandum submitted as Respondent's Exhibit, and contains the following statements:

> Upon commencement of a strike, all A & S benefits will be discontinued, except in those cases involving industrial accident or injury. A & S benefits will be continued to those employees who are disabled due to industrial injury until medically released by their doctors or until expiration of their benefits in accordance with the Plan's benefit schedule, whichever occurs first.

C. *The Recipients of Accident and Sickness Benefits*

1. Peter J. Gottfried

Gottfried, a union member, had an ongoing chronic illness, rheumatoid arthritis. In December 1979, while vacationing in California, he sought treatment from a rheumatologist, a physician who specializes in this disease.[6] On or about December 22, Gottfried contacted F. M. Chaney, the personnel director of Respondent's Casper facility, an admitted supervisor. Chaney instructed Gottfried to pursue his consultations with the specialist; to follow the prescribed course of treatment; and to take all the time necessary. On or about December 26 or December 28, 1979, Gottfried again called Chaney and in-

[2] It is unrefuted that the strike was an economic strike occasioned by the failure of Respondent and the Union to reach agreement during negotiations which commenced pursuant to a provision in the contract for reopening the agreement.

[3] Only the accident and sickness benefit plan is involved in the instant proceeding.

[4] With a stated exception not herein pertinent.

[5] There is no evidence indicating that any other hourly employees were not represented by any union or were represented by a bargaining agent other than the OCAW. Furthermore, there was no indication as to whether any unrepresented or supervisory employees were eligible for accident and sickness benefits and did or did not receive any payments under the plan.

[6] It is unrefuted that there are no rheumatologists in Casper, Wyoming.

formed him he would be unable to finish the prescribed course of treatment within the allotted vacation time and would have to be placed on sick leave, which was permitted by the Company. Gottfried remained in California receiving the treatments prescribed by the rheumatologist until January 6 or 7, when he returned to Casper and resumed treatments under his own physician. Upon his return to Casper, he telephoned the Company and asked to speak to Chaney, who was unavailable; therefore, he spoke to a Mr. Mathis and informed him that he was going to consult his local physician prior to returning to work. Gottfried believes the telephone conversation occurred on or about January 7. Gottfried saw his personal physician in Casper on January 30, and received another treatment which was apparently an injection, described as gold salts therapy, and was told he was responding well to the treatment. His physician informed him that he could return to work when he "felt like it."[7]

Shortly after the strike commenced, Gottfried again tried to contact Chaney telephonically to tell him about the medical treatment, but was unsuccessful. Gottfried decided that, because of the strike, there was no use in continuing his attempts to contact Chaney; he did not think it was necessary until he had received sufficient information from his own physician to relate to the Company a more definitive indication of his medical status.

Gottfried received payments for sickness and disability under the plan administered by Respondent until January 8, when all payments terminated. Gottfried did not protest to Texaco when his accident and sickness benefits were terminated in January at the commencement of the strike because he did not think it would do any good. Gottfried also did not attempt to make any reports after his unsuccessful attempt to call Chaney. Gottfried's failure to report was done with the admitted knowledge that the Company had an absentee policy but he does not interpret that policy as requiring day-to-day reporting while an employee is on sick leave. During the week of February 11, Gottfried felt well enough to take part in the strike and he commenced picketing. The picketing was engaged in pursuant to his doctor's instructions, who told him to go back to work or to assume picket duty when he felt like it. As soon as Gottfried felt well enough to go back to work, he actively supported the strike, feeling it was an obligation. Gottfried testified that he conscientiously could never cross a picket line, he would have to show some support for the strike. Gottfried has never crossed a picket line.

Respondent, in its brief, argues that there was no significant difference in Gottfried's arthritic condition from the time he went on vacation to his return to Wyoming on January 8, and, therefore, he should be considered ready to return to work and not eligible for accident and sickness pay. This argument is considered to be without merit. Respondent unrefutedly paid Gottfried accident and sickness benefits until the strike commenced. The obligations to ascertain Gottfried's ability to return to work and his willingness to do so remained the same, and it cannot now be argued that he never qualified for accident and sickness payments if Respondent had never previously questioned the propriety of his receiving such benefits, as demonstrated by its willingness to pay accident and sickness payments until the strike commenced. Accordingly, Gottfried's testimony that he was available for work on February 11 will be considered dispositive of when he was eligible to return to work, and his failure to do so will be construed as an affirmative showing of support for the strike. Respondent admitted that it never inquired if Gottfried supported the strike.

2. Michael L. Wergin

Wergin, a union member, commenced employment with Texaco in 1971. On or about the evening of January 6, he went on sick leave because he injured a knee. He underwent knee surgery. On or about February 7,[8] he was released by his doctor. Approximately 2 weeks later, he commenced picketing. Wergin received sickness and disability payments for the period preceding the commencement of the strike, which were terminated on January 8. He did not receive any payments for the period subsequent to the commencement of the strike. Wergin admitted that he did not report to work after he was released from the doctor because he decided to honor the picket line and to support the strike. He did not report his release for work to the Company at the time received because of the strike and his decision to participate therein.[9]

Wergin began picketing on or about February 21 and he continued to picket for the duration of the strike whenever his turn came up in the picketing rotation. Also during the strike, Wergin found a regular job, which he currently holds, at Anexter Mine Supply. The date he started working for Anexter Mine Supply is not a matter of record. There is no indication that he was ready to work immediately after his release on or about February 7 or prior to his commencement of picketing on or about February 21. Accordingly, his change of employment to Anexter Mine Supply is not found to demonstrate overt support for the strike prior to February 21 when he actively began to picket.

[7] Gottfried had informed the Company on the day of the strike, when he returned from California, that he had to have an appointment with his own doctor to undergo the treatment recommended by the specialist in California. There was no indication as to why the appointment was held several weeks after his return, whether it was pursuant to doctor's instructions or caused by other factors. Respondent seeks to infer that the delay was occasioned by Gottfried's assumption that he was on strike and there was no need to rush until the strike was over. This inference is insupportable because there was no evidence to indicate that Gottfried knew that the strike would last until January 30.

[8] The witness stated it was either February 7 or 10 that he was released by his doctor.

[9] Wergin is one of the Charging Parties. He signed a charge that was prepared for him, apparently by some union personnel. These facts are inadequate to support a finding that the filing of the charge by Wergin or any other individual was in contravention of the strike settlement agreement which the Union executed and contained a provision for withdrawal of all unfair labor practice charges by the Union. There was no showing that the Union did not withdraw all charges it previously filed, pursuant to the agreement, or that any of its activities on behalf of Wergin were not consonant with its duties of fair representation to its members or were in contravention of the strike settlement agreement.

3. William B. Noell

Noell, a current employee of Texaco, has been an employee of Respondent for 34 years. Noell, a union member, underwent an operation in November, the results of which led to the determination that he had cancer and he underwent therapy for that illness. The doctor released him to return to work on March 24; however, he never joined the picketing or even visited the picket line on the advice of his doctor who informed him that he should concentrate on his serious illness and stay away from the strike and the plant until she advised differently. He was never requested by the Union to picket. He did receive strike benefits as did all the other employees, including those discussed herein. He did not report for work when he was released because he decided to honor the picket line and support the strike. Noell has supported every strike that occurred at Respondent since his employment in 1950.

During the course of his illness and the treatment prescribed therefor, Noell kept in contact with the Company's nurse, Wareen Pierce. Sometimes the nurse called him and sometimes he called the nurse. He believes the contact was more or less out of her friendship with him. Respondent contends that the calls were made consonant with the Company's policy of keeping them informed of an employee's medical condition during his disability. Respondent argues that the obligation to keep the Company informed remains in effect during the strike and that an individual employee's failure to abide by that obligation was arguably an indicia of support for the strike. This argument will be considered hereinafter. The Company never inquired if Noell did support the strike.

4. John Vin

Vin, a union member, was also a long-term employee of Texaco, commencing his employment in September 1950. On January 8, he was on sick leave. Initially, his illness was the flu, but when he went to the doctor they found that he needed a cataract operation which was performed on December 13, 1979. He was still on sick leave on January 8. He was able to go back to work sometime after January 8, but did not return to his job because of the strike. When he was released by his doctor sometime in the latter part of January to return to work, he commenced picketing. He telephoned the nurse, since he could not cross the picket line, to inform the Company that he had been released by his doctor and could return to work. He does not recall when he called the nurse.[10]

Inasmuch as Vin and counsel for the General Counsel had the most appropriate access to Vin's medical records, and the Company had records which may have recorded his reporting of the release for work, and all failed to demonstrate the extent of any entitlement to accident and sickness benefits subsequent to January 8, it is concluded that his entitlement to such benefits after January 8, if any, should be determined at the compliance stage of these proceedings.

5. James T. Lake

Lake, a union member, was placed on sick leave sometime in the latter part of December due to low back pain. He was being treated by the Company's doctor. The treatment consisted of some unspecified sound treatments at the Company's facility in Casper, Wyoming, plus following the doctor's directions, which included staying at home and using a heating pad until he felt like working. He received accident and sickness benefits until January 8 when they stopped. Lake was not notified by the Company that the benefits would be terminated when the strike commenced. After January 8, he was not released by the doctor. When the strike commenced, he did not go to the plant to continue the treatments, and he did not call the nurse who was administering the treatments prior to the strike or any other individual at Respondent's facility. Lake stated he stopped going in for treatments because he did not want to cross the picket line. He did not inform the Company of his decision nor did he seek approval from the Union to cross the picket line to continue receiving treatments. The Company never called Lake to ask if he supported the strike. Lake stated that, if he made any assumptions about the Company's attitude, it was that they did not care what he did if he were on strike. Accordingly, he just stayed home with his heating pad and did not seek treatment elsewhere because he did not consult another doctor who could direct him to a place where he could continue the treatments.

Lake opined that he could have returned to work sometime after January 20. He began picketing sometime after January 20. Prior to January 20, sometime shortly after the strike commenced, he did stop by the picket line in his car. He does not recall, though, if he got out of his car; he thinks he probably did. He did not carry a picket sign, but he did talk to several of the picketers. He believes that the visit was approximately a week before January 20, which would be about January 13. Lake did receive the $150 check as part of the strike settlement as did all the other employees involved herein.

It is concluded that Lake's failure to continue seeking treatment by refusing to cross the picket line cojoined with his appearance at the picket line on or about January 13, where he stood, he believes, outside his vehicle and talked with some of the picketers, constituted public support of the strike activities, and constituted, as of January 13, a manifestation of public support for the strike sufficient to disqualify him from receipt of accident and sickness benefits after January 13. It is therefore concluded that Lake is entitled to receipt of accident and sickness benefits he would otherwise receive from January 8 through January 13, had it not been for the activities of other unit employees.

[10] The witness was confused as to the exact time the release was obtained, testifying initially that there was a release sometime around December 18, 1979, but since the cataract operation was December 13, 1979, and he stated he was released from the hospital December 16, 1979, it appears unlikely that he was ready to return to work on December 18, 1979, and failed to do so. Inasmuch as Respondent filled out documents indicating that accident and sickness benefits were due and owing through January 8, it is concluded that the witness' later testimony that the doctor approved his return to work sometime in the latter part of January when he commenced picketing is most probably accurate.

6. Robert G. Ravert

Ravert had worked for the Company approximately 13-1/2 years and had been a union member for the entire duration of his employment by Respondent. On November 3, he was involved in an accident away from work where he suffered three broken ribs and a fractured shoulder blade. Accident and sickness benefits were paid by Respondent from November 3 through January 8, 1980. Since January 2 or 3, he was receiving treatments almost daily thereafter from the nurse at Respondent's facility, until January 8, when the strike commenced. He did receive a treatment on January 8 and noted that the strike had begun when he was leaving the premises after receiving the treatment.

Ravert requested permission from the Union to continue receiving the treatments from Respondent, and the Union granted his request. When Ravert went to Respondent's facility to continue receiving treatments, a gateman and guard stopped him, telephoned someone at the facility, and refused to permit him to enter. This refusal on the part of Respondent's employees to permit Ravert to enter for a continuation of treatment requires that his termination of treatments during the strike be considered differently from Lake's actions, where he never attempted to continue treatments and was not denied access to the facility.

Ravert did visit the picket line once, at an unspecified date, but it was not shown that he got out of the car or in any way demonstrated public support for the strike.

Ravert was continuing medical treatment sometime after the strike commenced from a Dr. Roussalis, who gave him a return to work release dated March 24, 1980. The reason the release to return to work was obtained that day was that Ravert's wife had an appointment with the doctor on that day, so he went along to obtain the release. He was unclear whether it was given to Respondent at any time thereafter. Ravert did not participate in the picketing before or after March 24, 1980. It was stipulated that Ravert's personnel file contained two payroll authorization forms for leaves of absence and separation. The first form was dated December 14, 1979, and indicated that he was granted full accident and sickness benefits from November through December 31, 1979, with the date of return to work unknown.

The second payroll authorization form, dated January 17, stated, "[C]ontinue full accident and sickness benefits from 1-1-80 through 3:00 p.m. 1-8-80; employee on strike at 3:00 p.m., 1-8-80," and "date of return to work unknown." The record is unclear as to whether Ravert remained physically disabled from working during the duration of the strike. However, the personnel records clearly demonstrate that his benefits were terminated because of the strike activities of other employees. It is also clear that Respondent at no time throughout the duration of the strike inquired when Ravert would be able to return to his duties and refrained from making such a determination and did not state any reasons for its failure to do so. The failure of Respondent to permit Ravert on the premises to continue treatments precluded by its own actions the Company from having a fair assessment by its own medical staff as to when Ravert would be ready to return to work. Accordingly, the only clear evidence of record that Ravert was released to return to work was dated March 24, and it is found that entitlement to accident and sickness benefits terminated on March 24, 1980.

Ravert, like Wergin, also filed a charge concerning his loss of accident and sickness benefits. Ravert stated that he felt that he should have been paid his premiums and was inquiring about the propriety of the termination of such benefits. One of the individuals he talked to was Ralph W. Newman, chairman of the workmen's committee for the Local of the Union. As was the case with Wergin, there was no clear showing that the Union recruited Ravert or otherwise acted improperly so as to abrogate any of the employees' rights to seek redress through the instant proceeding. In fact, Newman credibly testified, that during the negotiations of the strike settlement, the Union stated that it was willing to withdraw the charges alleging unfair labor practices by Respondent for failure to pay accident and sickness benefits, but stated that they would continue to assist the membership if they wished to file charges alleging violation of the Act for Respondent's failure to pay them their accident and sickness benefits.[11]

The strike settlement agreement executed March 29, 1980, between Respondent and the Union states as follows:

> It is further understood that: (1) Each party will dismiss any and all litigation now pending against the other or its agents, i.e., injunctions, damage suits, etc. (including arbitrations, unfair labor practice charges, lawsuits and grievances related to any of the benefit plans); (2) that such dismissal will be at each party's own cost; and (3) that it is agreed that no new litigation growing out of or related to the strike will be filed.

The strike settlement agreement further provides, under the section entitled "Accident and Sickness Benefits":

> It is understood that employees who are unable to report to work due to sickness or accident which commenced after the strike began will be eligible

[11] A memorandum memorializing the negotiation meeting for strike settlement dated March 24, 1980, states as follows:

> The Union stated that they cannot bargain away an employee's individual rights for a $150 lump-sum payment. If an employee, on an individual basis, wished to file an NLRB charge or grievance on the A & S benefits lost during the work stoppage, would an employee have the right to do so? Management advised the Union that any employee on an individual basis could do so by law. It must be pointed out, however, that the Company would take a dim view of our bargaining relationship if any faction of the Union, local or international, were involved in such a complaint after the culmination of an agreement. Management would want this understood before any agreement is reached. Upon signing the agreement, the Union would be precluded from representation in any form or manner.

Newman stated that the Union was not representing these people, but was assisting them and that Newman was at the hearing on his own and not as a union representative. As the memorandum indicates, the individual employees retain the right to file charges which they have done so in this proceeding, and the evidence does not adequately show that there was any basis for making a finding as to whether the Union did or did not abide by the strike settlement agreement as reflected in the memorandum quoted above.

> for A & S benefits beginning with the termination of the strike, provided satisfactory evidence of disability is established, except that the first scheduled work day after the strike ends will serve as the customary 1-day waiting period in accordance with the terms of the Company's Accident and Sick Benefit Plan. In addition, for employees who were disabled before the strike began and were receiving A & S benefits, such benefits shall be resumed at the time the strike is officially discontinued if satisfactory evidence of continuing disability is established.

This document was signed March 29, 1980, by A. K. Sherer, acting plant manager, the chairman of the workmen's committee, Ralph Newman, the president of Local 2-230, John J. Kennedy, the International representative, Ronald D. Holloway, and a workmen's committee of four individuals. As Administrative Law Judge Ricci found in his Decision in *Emerson Electric*,[12] a contention that the settlement agreement requires dismissal of the instant complaint is without merit for the public right supersedes the private agreement. Furthermore, the language of the agreement does not clearly abrogate the rights of union members or other employees from filing charges. There is no explicit waiver of these rights.

D. *Discussion and Conclusions*

The Board, in *Emerson Electric Co., supra*, held that termination of sickness and accident benefits to employees who were physically unable to work on and after the date the strike commenced because other employees went out on strike, immediately upon commencement of the strike, was violative of the Act on the basis of the reasons given by the then Chairman Fanning's dissent in *Southwestern Electric Power Company*, 216 NLRB 522, 523 (1975), which states as follows:

> The Respondent takes the simplistic position that, as wages "under the law" are not continued for strikers, they are not continued for those on continuing sick pay unless the recipients disavow the strike. In essence, my colleagues agree. This ignores Section 7 and the right of an employee to join in or refrain from concerted activity. Granted, these employees on sick leave were entitled to no wages once their excused absences expired and they failed to return to work. It is a far cry for this Board to require that they disavow legal strike action by their Union during their sick leave in order to receive their sick pay. Not only is it contrary to the statute, but it lacks support in Board precedent. Cases where the Board has sanctioned the discharge of presumed strikers in the context of strikes in violation of no-strike provisions are inapplicable.
>
> In short, these employees had a Section 7 right to refrain from declaring their position on this strike while they were medically excused. That they exhibited some strike support after medical release, and testified that if physically able they would have joined the strike, is irrelevant in my view. To the extent, however, that some evidenced strike support by visiting the picket line and/or picketing before medical release, I would limit the amount of continued sick pay to the period ending with the date of such supportive action.

In overruling the inconsistent holdings of *Southwestern Electric Power Company, supra*, the Board stated, in *Emerson Electric Co.*:

> Accordingly, we now hold that for an employer to be justified in terminating any disability benefits to employees who are unable to work at the start of a strike it must show that it has acquired information which indicates that the employee whose benefits are to be terminated has affirmatively acted to show public support for the strike. [246 NLRB at 1144.]

The fact that the Company herein determined to terminate all accident and sickness benefits prior to the commencement of the strike does not abrogate the efficacy of the *Emerson Electric* case decision nor does it result in a determination that the decision was for a proper motive and therefore cannot be found violative of Section 8(a)(3) of the Act. As then Board Member Fanning indicated in his dissent in *Southwestern Electric Power Company* , the employee has the right to determine if he was going to join his counion members in their decision to withhold their services by joining in the strike. An individual who is on sick leave prior to the commencement of the strike and continues to be disabled to perform his work duties cannot be said to have ceased his work in connection with a current labor dispute and consequently cannot be considered a striker.[13]

As the Court recognized in *N.L.R.B.* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240, 255, 256 (1939):

> The conduct thus protected is lawful conduct. Congress also recognized the right to strike—that the employees could lawfully cease work at their own volition because of the failure of the employer to meet their demands.

Therefore, it is concluded that the six employees named above did not cease work as strikers, but were deemed unable to work due to sickness and disability and, until they were afforded an opportunity to exercise their right to determine if they were going to cease work or continue work, the presumption on the part of Respondent that they exercised their right of choice or

[12] *E. L. Wiegand Division, Emerson Electric Co.*, 246 NLRB 1143 (1979), citing *National Licorice Company* v. *N.L.R.B.*, 309 U.S. 350 (1940); *Amalgamated Utility Workers (C.I.O.)* v. *Consolidated Edison Co. of New York*, 309 U.S. 261 (1940); *Agwilines, Inc.* v. *N.L.R.B.*, 87 F.2d 146 (5th Cir. 1936); *J. I. Case Co.* v. *N.L.R.B.*, 321 U.S. 332 (1944); and *Harold A. Boire* v. *International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America [Pilot Motor Freight Carriers, Inc.]*, 479 F.2d 778 (5th Cir. 1973).

[13] Since individuals who have not announced their support for the Union who were on sick or disability leave prior to and continuing during the strike cannot be said to have voluntarily determined to withhold their services and to strike, the cases dealing with the cessation or continuation of benefits to strikers are held inapplicable.

would be treated as if they had exercised their right of choice deprives them of their options guaranteed under Section 7 to join or refrain from joining others in protected activity. An individual who is receiving sickness or disability payments when a strike commences, by definition, is not ceasing to withhold services as are the strikers, and therefore must be afforded the protection of Section 7 to exercise his option of joining or refraining from joining the strikers. By terminating the sickness and disability payments, Respondent in fact presumed such an election, based on the actions of the other employees.

The fact that in the instant case Respondent notified all employees that their benefits would be terminated at the commencement of the strike does not present a situation so distinguishable from *Emerson Electric* as to warrant the application of a different standard of behavior warranting a different result. In the instant situation, the motivating factor for the termination of the payments was the strike. Work would have been scheduled for all hourly employees except for the strike. Respondent, admittedly, did not ascertain whether all employees supported the strike. Furthermore, Respondent failed to demonstrate that the situation had such a potential for violence or that the strikers' conduct was so egregious as to warrant abrogation of the normal protections afforded under Section 7 of the Act. Furthermore, even if some of the strikers' activities were shown to be egregious, that would have been subsequent to the deprivation of the benefits and also is deemed irrelevant in the instant situation since the workers could not be termed to be strikers until their position regarding the strike was ascertained or they publicly demonstrated their support for the strike. There was no showing that the strikers or the Union caused Respondent any concern that the continuation of sickness and disability payments would have resulted in the lengthening of the strike or caused objectionable activity. Accordingly, it is concluded that Respondent has failed to present a valid business reason for abrogating these employees' rights to election under Section 7 to join or refrain from joining the strike for valid business reasons that outweigh the injury done to these employees by denying them such an election. It is also concluded that there is a direct link between the decision not to schedule work, not to pay sickness and disability payments to these employees solely because of the strike, which is a protected concerted activity.

Initially, Respondent argues that under the Texaco accident and sickness benefit fund, which was negotiated into the labor agreement, Texaco has reserved the right to terminate accident and sickness benefits and to require the employee to come forward and present satisfactory evidence of entitlement to such benefits. The notice posted at the plant and distributed to all the employees provides, as pertinent:

> 1. If you are unable to report for work as a result of accident, illness or for any other reason, you must call your supervisor, or the Night Foreman, when applicable, as early as possible and give the reason for the absence, the expected duration of the absence, and any other information the supervisor may need to plan for coverage for your vacant shift.
>
> 2. If you are unable to contact your supervisor or the Night Foreman, you may contact the Employee Relations Department. If you are unable to contact any of these, you must leave a number where you may be reached.
>
> 3. You should personally report your absence unless you are physically unable to do so. If you are unable to make the call yourself, your spouse or other family member may call for you following the procedure outlined in 1. and 2. above.
>
> 4. Failure to report an absence, or failure to properly notify supervision, will result in the absence being considered as AWOL.

At the inception of the various illnesses of the six employees here under consideration, they abided by the reporting of absence procedures as outlined in the above-quoted memorandum, which is Respondent's Exhibit 1. There is no showing regarding a frequency of reporting requirement being imposed by the supervisors or other individuals to whom the initial reports were given.

The argument that the negotiation of accident and sickness benefits into the agreement permitted obviating such terms of the provision in the benefit plan[14] is unpersuasive. The rules governing the plan provide:

> 4. Illness or accident occurring when an employee is not on duty will not serve to disqualify such employee for benefits under this plan except where such illness or accident occurs while he or she is on leave of absence granted for military service or leave of absence granted for personal business or layoff or vacation.
>
> * * * * *
>
> 12. This plan is entirely voluntary on the part of the Company and benefits hereunder shall not be subject to assignment, garnishment, attachment, or execution. Neither shall this Plan be construed to give any employee the right to be retained in the service of the Company or entitle him or her to benefits hereunder after his or her separation from service.
>
> 13. In the application of this Plan, the records of the Company shall be conclusive in determining an employee's length of service, salary, and wages.
>
> 14. The decision of the Company shall be final and conclusive with respect to every question which may arise relating to either the interpretation or administration of this Plan.

All employees are covered by the plan, and the rules do not create special exceptions for strikes or strikers.

That the Union agreed to article VIII, section 2, of the applicable agreement prior to seeking reopening of the contract does not denote an express waiver of employee rights to accident and sickness benefits. That section of the contract provides that the accident and sickness

[14] Jt. Exh. 5.

benefit plan is incorporated "and made a part of this Agreement subject to all the provisions of the Plans which we will determine all the questions arising under it in connection with the Plans, except that the Company agrees it will not voluntarily discontinue, change or modify such Plans during the term of this Agreement in such a way as to decrease the benefits under said Plans to any employee covered by this Agreement."

The Company's position that this provision is a waiver of employees' rights because the protections of the agreement were abrogated by the request for reopening and the strike pursuant to the reopener clause is unpersuasive. It is well established that any waiver of rights protected by Section 7 of the Act must be clearly and explicitly expressed. And there was no showing that such clear explicit expression had been agreed to by the Union. The Company acknowledges that, if any of the six employees involved herein called the Company and disavowed the strike, the entitlement to benefits may have been preserved. The *Emerson Electric* decision expressly discontinued this requirement which Respondent now seeks to reinstitute.

It is further found that the Company's argument that the failure of the employees to keep the Company informed as to their status on disability was in contravention of company policy, that the company policy was a proper requirement that the Union bargained away, and that the failure to meet this bargained-away requirement made it a matter of the Company's right to terminate the accident and sickness benefits and to refuse to pay them after the failure to declare they were disabled at the commencement of the strike is unpersuasive. As previously indicated, the company policy does not clearly describe the frequency of such reporting but does state that such reporting is necessary for coverage of vacant shifts. During the strike, the need for continued reporting may have been obviated under the provisions of section 1 of the notice posted by the Company and the fact that the Company has not established a clearly expressed procedure for notifying the Company in the event of a continuing absence in any or all of the cases here under consideration, it cannot be assumed that in each of the cases here involved the employee failed to comply with the company policy. In this proceeding, it was shown that all six employees totally qualified to receive accident and sickness benefits. There was no clear showing that there is a set procedure for the retention of eligibility in the event of a strike under the reporting of absence policy or otherwise, that was explicitly violated by all or any of the six employees whose benefits were terminated.

In fact, the Company did not choose to suspend the accident and sickness benefit plan as to all employees, as previously indicated; it terminated the accident and sickness benefit plan only to those employees whose injuries were not industrial injuries. As a practical matter, the decision in *Emerson Electric* does not prevent the Company, as indicated in the contract, from terminating accident and sickness benefits during the strike.[15] The Board's decision, rather, requires the Company to follow a certain procedure to insure the protection of Section 7 rights prior to making the determination regarding the individual employees' qualification for these benefits. According to the testimony of Floyd M. Chaney, the Company made its decision to terminate the benefits to the six employees predicated upon the assumption that the employees supported the strike. It was this basis for the termination of a particular employee's benefits, i.e., the assumption that they supported the strike, that was found objectionable in the *Emerson Electric* decision.

Respondent also argues that to require the Company to continue paying the strikers accident and sickness benefits would require the Company to finance the strike. This argument is not persuasive because *Emerson Electric* only requires the Company to ascertain if the employees receiving accident and sickness benefits do, in fact, support the strike. The fact that the Company could pick and choose whom it wishes to retain as beneficiaries under the accident and sickness benefit plan as indicated by its statement made January 8 that it would continue paying a certain class of employee beneficiaries demonstrates that it could similarly ascertain which employees were in fact supporters of the strike rather than assuming that all employees did, in fact, support the strike. The failure to ascertain what the employees' positions were with regard to the strike, cojoined with Chaney's admission that if an individual wished to return to work he would permit them to return to work, and considering that these employees could not be considered willfully withholding services while deemed medically unable to work, or until they publicly demonstrated support for the strike, leads to the imposing of sanctions because other employees in the unit went out on strike, an action found violative of the Act in the *Emerson Electric* decision. Inasmuch as the *Emerson Electric* and *Southwestern Electric* cases found the employees have a Section 7 right to refrain from revealing their strike sympathies when sick or disabled, there must be a clear, unmistakable, and unequivocal waiver of such right to refrain from revealing their sympathies. See, for example, *Keller-Crescent Company, a Division of Mosler*, 217 NLRB 685 (1975), enforcement denied 538 F.2d 1291 (7th Cir. 1976).

That Respondent indicated that the Union may discipline a member if they acted to hinder a strike does not, even absent a union-security provision in the collective-bargaining agreement, infer that the employees who join the Union did so voluntarily and, therefore, were inferentially in support of the strike. The Board, in the *Emerson Electric* decision, specifically overruled this reasoning in the *Southwestern Electric Power Company* decision. As then Chairman Fanning noted in his dissent in the above-quoted portion, "it is a far cry for this Board to require that they disavow legal strike action by their union during their sick leave in order to receive their sick pay." For that reason, the Board, in *Emerson Electric, supra*, requires the employer to first acquire information indicative of the employees' public support for the strike

[15] As provided in art. XV of the agreement, "should the union exercise its right to strike as provided under 2(b) above, all obligations imposed upon the parties to this Labor Agreement will be suspended with the commencement of such strike and shall continue to be suspended, unless and until it is mutually agreeable to both parties to reimpose said obligations."

prior to the termination of sickness and disability benefits.

The argument by Respondent that the history of 100-percent support of the membership previously in other strikes of the bargaining unit's decision to strike, cojoined with the admission by the six employees involved herein that they would have honored the picket line had they not been sick or disabled, and the fact that work was available but these employees did not seek it, does not modify or abrogate the requirements of *Emerson Electric*.[16] As indicated above, the violation of the Act as found in *Emerson Electric* is the termination of accident and sickness benefits to employees who were found to be unable to work at the commencement of the strike because other employees actively struck based upon the determination that the employees whose benefits were terminated were assumed to have ratified or supported the strike. This assumption, as admitted in the record, violates the employees' Section 7 rights to refrain from announcing their position with regard to a strike. For the above reasons, I find that Respondent violated Section 8(a)(3) and (1) of the Act by discontinuing sickness and disability benefits for the six employees from January 8 to the dates set forth above.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, found to constitute unfair labor practices, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Oil, Chemical and Atomic Workers International Union and its Local No. 2-230 are labor organizations within the meaning of Section 2(5) of the Act.

3. Respondent has violated Section 8(a)(1) and (3) of the Act by informing employees that it was withholding payment of sickness and disability and occupational illness and injury benefits during a strike, and withholding such payments from the employees named below in "The Remedy" section of this Decision for periods when these employees were not participants in the strike.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, it will be recommended that Respondent be required to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

It having been found that Respondent unlawfully withheld sickness disability, occupational illness, and injury benefit payments from the six employees listed during a strike at times when they were not strike participants, these employees should be reimbursed for benefits lost under these plans from January 8, 1980, the date the strike began, when these benefit payments were discontinued, until the dates shown next to the names of the respective employees: Peter J. Gottfried, February 11, 1980; Michael L. Wergin, February 21, 1980; William B. Noell, March 24, 1980; James T. Lake, January 13, 1980; Robert G. Ravert, March 24, 1980; and John Vin, Undetermined.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[17]

The Respondent, Texaco Oil Company, Casper, Wyoming, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Withholding or announcing the withholding of sickness, disability, occupational illness, and injury benefits from employees during a strike for the purpose of coercing them or other employees in the exercise of their rights to belong to a union and engage in other protected concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them under Section 7 of the Act.

2. Take the following affirmative action deemed necessary to effectuate the policies of the Act:

(a) Make whole the employees listed in the section of this Decision entitled "The Remedy," in the manner set forth therein, by paying to each whatever sickness and disability or occupational illness and injury benefits were due them during the period January 8, 1980, to April 1, 1980, with interest, provided that no such payment shall be due for the periods subsequent to any employee's active participation in strike activity or public support thereof.

[16] Respondent argues that certain representations by the Union should be binding on the employees on sickness and disability leave including the fact that they did not protest the termination of the payments and that the six employees were scheduled for picket duty. These arguments overlook the fact that the Union, in its failure to protest, cannot be construed as explicitly waiving any rights and the fact that the Union scheduled the six employees in question for picket duty was done at a time preceding their ascertaining who was on sickness and disability at the time of the strike but was done weeks preceding the strike. This argument also overlooks the uncontroverted testimony that once it was learned that an employee in the unit was considered disabled or sick, or otherwise unable to work, the employee was explicitly not scheduled for picket duty nor was he required to engage in picket duty because such requirement was considered too dangerous for his safety, and the medical determination of his disability or sickness was to be respected and was, in fact, respected by the Union.

[17] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(b) Preserve and make available to the Board or its agents, upon request, all records necessary to analyze the amount due in the effectuation of this remedial order.

(c) Post at the Respondent's place of business in Casper, Wyoming, copies of the attached notice marked "Appendix."[18] Copies of said notice, on forms provided by the Regional Director for Region 27, after being duly signed by its representatives, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by it to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 27, in writing, within 20 days from the date of Order, what steps Respondent has taken to comply herewith.

[18] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT withhold or announce that we will withhold payment of sickness and disability and occupational illness and injury benefits from you during a strike to discourage you or our other employees from belonging to a union or from engaging in other protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of rights guaranteed you by Section 7 of the National Labor Relations Act, as amended.

WE WILL make the following employees whole, with interest, for sickness and disability or occupational illness and injury benefit payments due them from the time such payments were withheld until their recovery and active participation in strike activity or the resumption of benefit payments, whichever is earlier:

Peter J. Gottfried	James T. Lake
Michael L. Wergin	Robert G. Ravert
William B. Noell	John Vin

TEXACO OIL COMPANY